

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.108 OF 1995

The State of Maharashtra

Appellant
(Org.Complainant)

Vs.

1. Nivrutti Babu Bhagat
2. Dilip Nivrutti Bhagat

Respondents
(Org.Accused
Nos.1 & 2)

Dr.F.R.Shaikh, APP for State.

Ms.V.R.Raje h/f. Mr.S.R.Chitnis, Senior Advocate for
respondents.

CORAM: S.S.PARKAR & ANOOP V.MOHTA,JJ.

February 22, 2005.

ORAL JUDGMENT (PER S.S.PARKAR,J.)

1. This appeal is filed by the State challenging the judgment and order dated 2/12/1994 delivered by the Addl. Sessions Judge, Pune acquitting the respondents-accused of the offences under Sections 302, 449 and 323 read with Section 34 of IPC with which they were charged in Sessions Case No.288 of 1991.

2. Prosecution case briefly narrated is as follows:

. The incident had taken place on 24th February 1991 at about 7 p.m. in village Bhagatwadi in Taluka Haveli, Dist.Pune in front of the house of the deceased and the complainant. Both the respondents-accused, who are father and son, were also residing near the house of the complainant. According to the prosecution case the respondent no.2 had teased the wife of deceased Baban by name Lata about three-four days before the date of incident. On the date of incident when deceased Baban and his father complainant PW 2 Khandu Bhagat were sitting outside their house on the "otta" at about 6 p.m., accused no.1 Nivrutti was passing from in front of the house of the complainant. Deceased Baban called accused no.1 and asked him to tell his son, accused no.2-Dilip not to tease his wife. Hearing this accused no.1 started abusing the deceased and caught him and pulled him out. Baban's mother Draupadabai and his wife Lata came out of the house and requested accused no.1 not to beat Baban. Accused no.1 had allegedly given fist blows to Baban's wife Lata and slapped the complainant. In the mean time accused no.2 came there, picked up a firewood lying there at

the entrance of the cattle-shed of the complainant and assaulted the deceased on his head with the firewood as a result of which the deceased fell down. Baban was lifted and kept on the platform by his father and the lady members of the house. Complainant father went to the house of Police Patil. But as he was not there, he went to the house of Sarpanch who directed him to inform the Police Patil about the incident. Mean time Baban also had died. Then Police Patil was contacted by the complainant and thereafter he went to the police station and lodged his report which is Exhibit 21 in which he had narrated the incident of assault. The crime was registered against both the accused in the midnight. In the morning PSI Mane visited the spot and drew inquest panchanama and the spot panchanama. The accused were arrested same day evening on 25/2/1991. The dead body was sent for post-mortem examination. Complainant Bhagat was also sent for medical examination. The doctor had found abrasion on his left haematoma. Samples of blood of the accused were also collected. The clothes of the accused as well as deceased were seized under panchanamas.

3. During the investigation statements of witnesses were recorded. While in custody on 1/3/1991 accused no.2 volunteered to produce the firewood which was kept by him under the heap of paddy bundles in his own field. The said firewood was recovered at the instance of accused no.2 under the seizure panchanama. The clothes of the accused and the deceased as well as the sample of hair of the deceased was sent to the CA for examination. After completion of the investigation charge-sheet was filed and the case was committed to the Sessions Court.

4. In the Sessions Court charge was framed for offences of murder under Section 302 read with Section 34 of IPC and also for offence of trespass under Section 449 and assault under Section 323 both read with Section 34 of IPC against both the accused to which they pleaded no guilty. On behalf of the prosecution seven witnesses were examined who are as follows:

. PW 1 is Dnyanoba Kamble who acted as panch for

the inquest and spot panchanamas. PW 2 is Khandu Bhagat, the complainant who is father of the deceased Baban. PW 3 is Somnath Tikone who acted as panch for the discovery of firewood at the instance of accused no.2. PW 4 is Manda Bhagat, the sister-in-law of the deceased. PW 5 is Dr. Wable who conducted autopsy on the dead body. PW 6 is PSI Mane who investigated the case and lastly PW 7 is Arun Bohir, Asst. Director of Forensic Laboratory. The defence of the accused was of total denial and false implication.

5. After considering the evidence on record the trial Court acquitted both the accused on the ground that the prosecution witnesses had deliberately shown a different location as the place of incident and there was possibility of the deceased receiving the injury on his head which was cause of his death due to fall on the stony surface outside the house of the complainant. The said order of acquittal is impugned in this appeal filed by the State against both the accused respondents.

6. We have gone through the entire evidence on

record and heard the learned APP as well as the defence Advocate at length and find that the reasoning of the trial Court acquitting accused no.2 is far from satisfactory and is inconsistent with the medical evidence as well as the ocular evidence led by the prosecution.

7. The residential houses of the deceased and the accused are adjoining to each other. The incident had taken place in the evening time between 6 and 7 p.m. Immediately after the incident father of the deceased Khandu Bhagat-PW 2 went to the house of the Police Patil to inform him about the incident. As the Police Patil was not in the house he went to the house of the Sarpanch who told him to approach the Police Patil who had gone to Pune that time. The complainant then along with others went to Pune and contacted the Police Patil and told him about the incident. The Police Patil took the complainant to Haveli police station where his complaint was recorded by PSI in the midnight. That complaint is produced at Exhibit 21 on record which mentions the details as to how the incident took place. The crime was registered, inter alia, for offence under Section

302 of IPC as Baban had succumbed to his injuries within short time after the incident. The complainant has deposed in his evidence that three days before the incident deceased Baban had told him that accused no.2 had misbehaved with his wife. That time complainant told Baban that they should keep quiet in the matter. On the date of incident both complainant and deceased had returned from their work in the evening. When accused no.1 came in front of their house deceased Baban asked him to admonish accused no.2 as they were neighbours. But accused no.1 Nivrutti got angry and pulled Baban out. When the complainant and wife of Baban went to rescue Baban, accused no.1 slapped the complainant and also gave fist blow to Lata, wife of the deceased. In the mean time accused no.2 came there and picked up a firewood from the heap of firewood which was kept there and assaulted Baban on his head. As a result of the said blow Baban fell down and both the accused ran away. His evidence is corroborated by his another son Heeraman's wife Manda who is examined as PW 4. According to her deposition when she heard altercation going on outside the house, she came out of the kitchen. Deceased Baban was asking Nivrutti, accused no.1 to admonish his son Dilip i.e. accused

no.2 who had behaved indecently with deceased Baban's wife. She saw accused no.1 slapping Baban and giving blow to her father-in-law. That time her mother-in-law and Lata, wife of Baban were pulling Baban inside the house and requesting him not to quarrel. In the mean time accused no.2-Dilip came there. He took one firewood which was lying in front of the "otla" of their house and assaulted Baban on his head as a result of which Baban fell down and died after some time. The evidence of above two eye witnesses is squarely corroborated by the FIR which was lodged immediately after the incident. The police station was at taluka place. The complainant went to the house of Police Patil and as he was not there he went to the house of Sarpanch who told the complainant to go and tell the Police Patil who had gone to Pune. Thereafter the complainant went to Pune and contacted Police Patil in his house there and then Police Patil took him to the police station where his FIR was lodged. In the process it was midnight by the time the FIR was lodged.

8. The evidence of the two eye witnesses has not been accepted by the trial Court on the ground that

there is change in the place of incident. While the witnesses have stated that the incident took place in the cattle-shed but no blood was found in the cattle-shed but the same was found outside the cattle-shed as per the spot panchanama. Secondly the trial Judge has observed that if the incident had taken place in front of the house of the deceased PW 4 Manda would not have been in a position to witness the incident of assault. Apart from the sketch which is there on record but does not appear to have been exhibited the trial Judge had himself taken the inspection of the place of incident and prepared his notes of spot inspection which are produced on record at Exhibit 47. As per the evidence of the witnesses including PW 1, who was panch to the spot panchanama (Exhibit 19), the situation of the place of incident appears to be as follows:

. The house of the accused and that of the complainant are adjoining to each other. In between their house there is a lane hardly of 3 ft. width. At the entrance of the house of the complainant there is a cattle-shed. Before entering the cattle-shed there is a platform called 'otla'. After the cattle-shed there is verandah and then there is

entrance door to the house of the complainant. The complainant i.e. the father of the deceased was residing with his other two sons while Baban was staying separately in the same house. Even as per the inspection notes of the trial Judge after entering the house of the complainant from the entrance door there is one cattle-shed running North-South which is closed from the West side. To the West of the said cattle-shed there was one platform in the same house. In paragraph 9 of the said inspection notes the trial Judge has recorded that if a person is standing on the entrance door of the kitchen of the complainant's house, he can observe the things which are on the platform or in the cattle-shed of the house but cannot see anything outside the Northern entrance door of the house. Between the road and the house there is a cattle-shed. As per the evidence of panch to the spot panchanama PW 1 Dnyanoba Kamble the dead body was lying on the plinth of the house i.e. after the cattle-shed near the entrance of the door. Blood stains were lying near about the spot from where the police had collected earth mixed with blood. There were two platforms outside the house of the deceased between road and house. Firewoods bundles were lying

on the platform which was outside the house. He has also deposed that the spot where the firewood was lying i.e. on the platform there were stains of blood. Thus the incident had taken place just outside the house of the complainant.

9. The trial Judge has doubted the place of incident as deposed to by two eye witnesses on the ground that no blood stains were found in the cattle-shed though according to the evidence of eye witnesses the incident had taken place in the cattle-shed. The cattle-shed itself was very small and when the quarrel had taken place and accused no.1 had pulled deceased from the platform where he was sitting and thereafter hit on the head by accused no.2, the absence of blood stains in the cattle-shed cannot falsify the evidence of two eye witnesses. The trial Judge had not considered that accused no.2 had dealt only one blow with firewood on the head of deceased Baban causing fracture of the skull from which the blood was not likely to ooze out immediately as there was no incised wound caused to deceased Baban. The members of his family including his father, wife and other relations were present at the spot and, therefore, he must have been

immediately lifted and placed on the platform where the blood stains were noticed. Even if the actual assault had taken place outside the cattle-shed the evidence of these two eye witnesses cannot be discarded for the absence of blood stains in the cattle-shed. Both the witnesses were the inmates of the house outside of which the incident had taken place pursuant to the quarrel or altercation which took place between Nivrutti and deceased Baban. Complainant and PW 4 Manda would naturally come out after hearing the quarrel with deceased Baban. Complainant was already outside his house and he was sitting on the platform in front of his house at that time and, therefore, he was not required to even come out of the house to see the incident. He was present at the place where the incident took place. It was in his presence that Baban asked accused no.1 to admonish his son, accused no.2 because of which accused no.1 got angry and pulled deceased Baban out. When the complainant and wife of deceased, Lata intervened they were also slapped and assaulted by accused no.1. At that time accused no.2 came on the scene and dealt a heavy blow with firewood on the head of deceased Baban which resulted in his death.

10. The observation of the trial Judge on the basis of his personal inspection taken by him of the place of incident that it was not possible to observe anything which was going on outside the house of the complainant from the kitchen of the house of the complainant is absolutely irrelevant. PW 4 Manda has deposed that she witnessed the incident by standing in the courtyard which is in front of the kitchen and the incident was going on in front of the house i.e. in front of the entrance door of the house. As per the evidence of these eye witnesses initially talk or quarrel took place between deceased Baban and accused no.1 and accused no.2 came subsequently when quarrel was going on between the two. By that time naturally PW 4, who was the inmate of the same house, would come out in the courtyard to see what was happening. So far as complainant is concerned he was already there at the place of incident and the entire incident had taken place in his presence. The trial Judge has just lifted couple of sentences from the depositions of these witnesses and tried to show that they were not eye witnesses to the incident and had deliberately shown different place as the place where

the assault took place with a view to prove that PW 4 Manda was in a position to see the incident. As observed earlier, the trial Judge has gone on absolutely wrong footing that Manda was not in a position to see the incident from kitchen when the witness has deposed that she had witnessed the incident by standing in the courtyard which was in front of the kitchen and the incident was going on in front of the house near the entrance door of the house.

11. The evidence of eye witnesses is sufficiently corroborated by the medical evidence. The prosecution has examined Dr.Wable PW 5 who had conducted post mortem examination on the dead body. As per his deposition and the post mortem examination notes the deceased had received following external injuries:

(1) Lacerated wound in the middle of head on frontal region two and half in this bridge of the nose, measuring two and half inch into three fourth inch - bone deep. Gaping present, angle and margin irregular.

(2) Right black eye.

(3) Abrasion over left scrotum, measuring three fourth inch into half inch.

(4) Abrasion left knee.

(5) Abrasion on inner aspect of left thigh half into one fourth inch.

(6) Abrasion on left buttock, three and half into two and inch.

According to Dr.Wable injury nos.1 to 4 were ante mortem and recent. He had also noticed corresponding internal injuries which are as follows:

(1) Haematoma over frontal region, three into two inches in the middle corresponding to external injury no.1, and right supra orbital region, one half into one inch, corresponding to external injury no.2.

(2) Crack fracture-frontal bone, starting from medial angle of right eye extending vertically upwards, over parietal bone, on right side, six inches long.

(3) Fracture roof of orbit on right side.

(4) Fracture body of sphenoid.

(5) Subdural haemorrhage all over brain surface. Subarachnoid haemorrhage, both parietal lobes and cerebellum. Contusion on right cerebellum.

The internal injuries were according to the Medical Officer corresponding to external injury nos.1 and 2. The cause of death was due to the head injury. According to the said witness the external injury

nos. 1 and 2 along with corresponding internal injuries were sufficient to cause death in the ordinary course of nature. He has also deposed that injuries could be caused by hard, blunt and heavy object. According to him injury no.1 was possible by firewood (Article no.19) which was recovered at the instance of accused no.2.

12. Thus the medical evidence fully corroborates the evidence of eye witnesses. Surprisingly according to the trial Judge the injuries of the deceased Baban were possible due to fall. As per the medical evidence there was fracture of skull of the deceased. There was lacerated wound in the middle of head of frontal region which was 2 1/2" x 3/4" - bone deep. The doctor has also noticed crack fracture of frontal bone. There was also fracture of roof of orbit on right side and haematoma of frontal region. The Medical Officer has in his deposition categorically stated that if a person fell violently on stony surface from standing position in a scuffle, there was no possibility of fracture of skull which was suffered by deceased Baban. Taking support from the admission of doctor that violent fall on the

stone may cause crack fracture as described in internal injury no.1, the trial Judge has concluded that deceased must have received the fracture due to fall on the ground in the course of scuffle. There could be various possibilities. What the Court has to see is whether medical evidence is consistent with the evidence of eye witnesses or not. Reference may be made in this connection to the judgment of the Supreme Court in the case of Punjab Singh v. State of Haryana reported in **1984 Cri.L.J. 921**. Similarly in the case of Gangadhar behera v. Stae of Orissa reported in **(2002) 8 SCC 381** it has been held that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".

13. There can be very very remote chance of a person suffering fracture of skull due to fall. According to the Medical Officer the fall has to be a violent fall and it must be again on a stone which should be a pointed one. In our view even if there is violent fall on a pointed stone the size of the fracture of frontal bone cannot be of the size which

was suffered by deceased Baban. There is no material on record to show that there was any occasion for Baban to get a violent fall and that also on a pointed stone. No pointed stone or stone of the type which was capable of causing such fracture as was suffered by deceased Baban was shown to have been blood stained. The spot panchanama does not support the conclusion arrived at by the trial Court. The learned trial Judge has only observed that the place outside the cattle-shed of complainant was stony. The finding of the trial Judge that deceased Baban might have received fracture injury on his head due to fall is without any basis or evidence on record but the said finding has been given on the basis of imagination that in the scuffle or in the push and pull the deceased might have fallen on the stony surface and received the fracture on his head which is not even a remote possibility.

14. The trial Judge has also considered the post mortem notes in which the doctor had found the stomach of the deceased Baban empty though according to the complainant after return to his house at 6 p.m. Baban had taken meals and thereafter come out of the house. First of all deceased was residing

separately from his parents and, therefore, whether he had taken the meals or not may not be within the knowledge of the complainant and the sister-in-law of the deceased. Secondly because there was no traces of food or food particles found in the stomach of the deceased the said circumstance cannot be taken to falsify the evidence of eye witnesses who were natural eye witnesses whose presence at the relevant time at the place of incident could not be and was not challenged and their evidence has been corroborated by the immediate complaint lodged by the complainant and the medical evidence as regards the injuries.

15. The trial Judge has observed that the deceased must have fallen down because he being in the business of selling liquor must have consumed liquor at that time and, therefore, must have fallen down and received the injuries. Such possibility is contemplated by the trial Court even though the post mortem report does not indicate that deceased Baban had consumed liquor at the time of incident. On the contrary Dr.Wable has deposed that he noticed 30 ml. reddish fluid in the stomach without any specific

smell. It is pertinent to mention that in answer to the Court question PW 5 Dr.Wable has deposed that considering the internal injuries, injury no.1 was not possible by fall on the stony surface because fracture no.1 was on the skull vault, while injury nos.2 and 3 are at the base of the skull and there was also internal damage to the cerebellum which is at the lower part of the brain and, therefore, it was not possible to have a direct injury to the base of skull as well as cerebellum. The doctor has also deposed that much force is required to produce internal injury no.3 and injury to cerebellum. The trial Court has observed that as Baban was under the influence of liquor he must have fallen with force on stony surface and thereby sustained injuries. This observation and finding of the trial Court is without any basis or foundation and is inconsistent with the evidence on record and the same is negatived by the positive and categorical evidence of the Medical Officer.

16. According to the defence the accused were falsely implicated because of the previous enmity. Few days before the incident the deceased had to pay

a fine of Rs.125 because of the objection raised by the people in which accused had taken lead. But as stated by the complainant, the deceased had complained to accused no.1 about the misbehaviour of accused no.2 with his wife which constitutes motive for the accused to assault the deceased. The complainant could not have falsely concocted the theory of deceased complaining to accused no.1 about the misbehaviour of accused no.2 with the deceased's wife immediately after the incident in question. The said fact is mentioned in the FIR also by PW 2 complainant Bhagat. The accused no.1, instead of advising or admonishing his son, started man-handling deceased Baban and when accused no.2 came on the scene he dealt a heavy blow on the head of the deceased with a firewood.

17. The trial judge after noticing minor discrepancies in the evidence of two eye witnesses i.e. complainant and PW 4 Manda observes that their evidence is not at all reliable and, therefore, independent corroboration was necessary. He has observed that material witnesses have not been examined and the Investigating Officer has changed

the spot of incident. It is common knowledge that in a matter of this kind there is hardly any possibility of independent witnesses coming forward to give evidence even if they had witnessed the incident in question. In this case it is nobody's case that there was any independent person who had witnessed the incident. Merely because witnesses are close relations of the deceased cannot be the ground to doubt the credibility of the witnesses as held by the Supreme Court in the case of Gangadhar Behera v.

State of Orissa reported in **(2002) 8 SCC 381**.

18. The observation of the trial Court that when accused no.2 reached there, there must have been some pull and push on the spot and there was possibility that at that time the deceased must be under the influence of liquor and must have fallen down forcibly on the stony surface and sustained the injuries is nothing but the creation of the imagination of the trial Judge. There is no question of there being any of the two probabilities in this case that either deceased had received the injuries due to the assault by accused no.2 or due to fall before the trial Court and the trial Court had opted for the view or the possibility which was in favour

of the accused. There was absolutely no basis even to think of the possibility of the deceased receiving the fatal injuries due to fall as contemplated by the trial Court. Such possibility is purely imaginary and the finding based on conjecture is unwarranted and illegal and, therefore, liable to be interfered with.

19. Apart from the aforesaid evidence the prosecution has also led the evidence of discovery of firewood at the instance of accused no.2 which was hidden in a heap of paddy crop in his own field. But since no blood was noticed on it by the C.A. the said circumstance cannot be used against the accused. From the ocular evidence corroborated by the medical evidence and the immediate FIR lodged by the complainant, whose presence was absolutely natural and not even challenged by the defence the prosecution has proved beyond reasonable doubt that the deceased had received the fatal injury at the hands of accused no.2. Since only one blow has allegedly been given by accused no.2 to which accused no.1 was not party nor he is stated to have instigated accused no.2, accused no.1 cannot be held

guilty by virtue of section 34 of IPC. There is no satisfactory evidence about the trespass in the house of the complainant or the deceased by any of the accused persons and, therefore, the charge for trespass is not proved nor there is sufficient evidence against accused no.1 much less against accused no.2 for offence of assault under Section 323 of IPC on the deceased or any other witness and, therefore, that charge also cannot sustain.

20. The question now is what offence can be said

to have been committed by the accused no.2. From the evidence on record it is quite clear that the injury which resulted in the death of Baban was caused by single blow given by accused no.2 on the head of Baban with a dangerous weapon like firewood which is normally a heavy one. At the time of incident it appears that there was quarrel between accused no.1 and the deceased because of which complainant, who is the father of the deceased, had intervened. There is also evidence that Lata, wife of the deceased, had also intervened. At that time accused no.2 came on the scene and seeing the scuffle between the deceased, his father and accused no.1, he picked up

the firewood which was lying there and dealt a heavy blow on the head of the deceased and ran away. The deceased fell down due to the said assault. Since accused no.2 had not come armed with any weapon but on the spur of moment he had picked up a firewood lying near the place of incident where the scuffle was going on between deceased and the appellant's father and assaulted the deceased, we cannot infer intention on the part of accused no.2 to murder deceased Baban. However, the case would be covered by clause 2ndly of Section 300 as the accused no.2 can be attributed the intention of causing such bodily injury as the offender knew to be likely to cause the death of deceased Baban. The circumstances which have been discussed above show that the offence was committed without premeditation in the heat of passion upon a sudden quarrel and, therefore, Exception 4 of Section 300 of IPC would be applicable. Consequently the offence committed by the accused no.2 would be punishable under Section 304 Part II of IPC. Considering the circumstances of the case, we are of the view that sentence of 7 years' imprisonment and fine of Rs.3000/- would be adequate punishment to the appellant.

21. In the result, the appeal is partly allowed.

The order of acquittal of accused no.1 recorded by the Addl. Sessions Judge, Pune in Sessions Case No.288 of 1991 is confirmed and his bail bonds shall stand cancelled. The acquittal of respondent no.2-original accused no.2 - Dilip Nivrutti Bhagat for offences under Sections 302, 449 and 323 of IPC recorded by the Addl. Sessions Judge, Pune in the above Sessions Case is confirmed. However, he is convicted for offence under Section 304 of IPC and sentenced to rigorous imprisonment for seven years and to pay a fine of Rs.3000/- in default to suffer further imprisonment for one year. He shall be entitled for set off under Section 428 of Cr.P.C. He shall surrender to his bail bonds forthwith.

(S.S.PARKAR,J.)

(ANOOP V.MOHTA,J.)